UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

and

STATE OF MINNESOTA, by its Attorney General Hubert H. Humphrey, III, its Department of Health, and its Pollution Control Agency,

Plaintiff-Intervenor,

v.

REILLY TAR & CHEMICAL CORPORATION; HOUSING AND REDEVELOPMENT AUTHORITY OF ST. LOUIS PARK; OAK PARK VILLAGE ASSOCIATES; RUSTIC OAKS CONDOMINIUM, INC.; and PHILLIP'S INVESTMENT CO.,

Defendants,

and

CITY OF ST. LOUIS PARK,

Plaintiff-Intervenor,

v.

REILLY TAR & CHEMICAL CORPORATION,

Defendant,

and

CITY OF HOPKINS,

Plaintiff-Intervenor,

v.

REILLY TAR & CHEMICAL CORPORATION,

Defendant.

Civil No. 4-80-469

MEMORANDUM IN SUPPORT OF REILLY TAR & CHEMICAL CORPORATION'S MOTION FOR RECONSIDERATION OR OTHER ALTERNATIVE RELIEF

INTRODUCTION AND SUMMARY

Defendant Reilly Tar & Chemical Corporation ("Reilly"), brings this motion to reconsider or for other alternative relief in response to this Court's ruling dated August 25, 1983. In that ruling, this Court granted the motion by the State of Minnesota ("the State") for summary judgment as to the second affirmative defense which Reilly raised in its amended answer.[1/]

The gist of Reilly's second affirmative defense is that several of the State's claims are barred as a result of the settlement of a state court lawsuit involving the State, the City of St. Louis Park ("the City"), and Reilly. It is Reilly's belief that the State had given the City its authority and its approval to settle that lawsuit. In order to prove that, Reilly plans to present evidence demonstrating the State's intent to be bound by that settlement. However, during the course of discovery in this case, Reilly has been continually prevented from developing such evidence by deponents who have refused to answer any questions pertaining

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1/ The Court also granted summary judgment in favor of the United States as to the first and second affirmative defenses raised by Reilly in its amended answer. That ruling was not contested by Reilly and is not the subject of the present motion.

to that subject matter. Consequently, Reilly has brought two motions to compel discovery. These motions remain undecided.

In its present motion, Reilly seeks the following relief: (1) reconsideration and reversal of that part of the order of August 25, 1983 granting the State's motion for summary judgment, (2) in the alternative, vacating that same part of the order without prejudice to a resubmission of motions for summary judgment after the completion of discovery, or (3) in the alternative, amending the order by adding the certification language of 28 U.S.C. § 1292(b) so that this issue may receive immediate interlocutory review by the Court of Appeals.

Grounds for this motion include the arguments originally set forth in Reilly's legal memorandum in opposition to the State's motion for summary judgment and additional grounds enumerated in Defendant Reilly Tar & Chemical Corporation's Motion for Reconsideration or Other Alternative Relief. Rather than burden the Court with a repetition of material contained in the above-referenced memorandum, this memorandum hereby incorporates that prior memorandum by reference. This memorandum is addressed to the following points:

(1) Under the law of contracts, evidence of intent to enter a contractual relationship should be considered along with manifest actions to determine whether a contract exists;

(2) Where, as here, there are conflicting inferences to be drawn from the facts on the record, summary judgment should not be granted; especially where the non-moving party has a pending motion to compel discovery concerning that issue; and

(3) Should the Court decline to reverse or temporarily vacate its order of August 25, 1983, the Court should amend its order to add the certification language of 28 U.S.C. § 1292(b).

ARGUMENT

I. Evidence of Intent to Enter a Contractual Relationship Should be Considered along with Manifest Actions to Determine Whether a Contract Exists.

In granting partial summary judgment, the Court seemed preoccupied with the lack of a face-to-face meeting between Reilly and the State and with the absence of a text book example of "a definite offer and acceptance . . . which could constitute a meeting of the minds on the essential terms of a settlement agreement." Memorandum Order at 16. We submit that such a narrow interpretation of the law of Contracts writes out of existence a massive body of law relating to implied contracts.

In considering this subject, we should first recognize that in this case we have an express contract, in writing, resulting from a definite offer and a definite acceptance. That written contract, RTC ex. 31, expressly provides that it was intended to be a settlement with the State as well as the City. It explicitly provides:

> It is understood that this agreement represents a means of settling the issues involved in State of Minnesota, by the Minnesota Pollution Control Agency and the City of St. Louis Park, Plaintiffs, vs. Reilly Tar & Chemical Corporation, Defendant, Hennepin County, Minnesota District Court Civil File No. 670767. (Underlining in original) Ibid.

This agreement spoke in the present tense, not future, and did not purport to be a settlement solely with the City but purported to be and was understood by Reilly as a settlement with both plaintiffs. The subsequent delivery of a written dismissal was merely ministerial. See Thomas E. Reiersgord affidavit of June 23, 1983, ¶ 15, p. 7-8, and affidavit of September 15, 1983.

Obviously, a question arises as to whether this agreement was negotiated on behalf of the State, as well as the City, and whether the City had the authority to negotiate on behalf of the State in this manner. However, there can be no doubt about the legal proposition that one can appoint an agent to act in his behalf and that the acts of the agent are then the acts of the principal. Restatement (Second) of Agency §§ 1,140 (1958). It was Reilly's belief at that time, and still is, that the City was negotiating on behalf of the State as the State's agent; and that the settlement agreement dated April 14, 1972 (RTC ex. 31) was in fact entered into on behalf of both the City and the State. This is the main basis for Reilly's second affirmative defense in its amended answer.

However, Reilly's attempts to demonstrate that to date have been frustrated in several ways.

First, as disclosed by the Schwartzbauer affidavits of September 2, 1983 and September 15, 1983 and by the depositions of Lindall, Van de North, Popham, Worden and Macomber, the lawyer-negotiators have refused to answer questions as to whether the City was acting as the State's agent and related questions on the ground that the communications between the State's lawyers and the City's lawyers which established the agency relationship are privileged communications.

Second, as indicated to the Court on oral argument, Thomas J. Ryan, Executive Vice President of Reilly in 1972, is deceased. Mr. Ryan is the Reilly official who dealt directly with Thomas E. Reiersgord, Reilly's attorney at that time, and with the City in connection with the settlement negotiations.

Third, George R. Koonce, the State PCA official who was closest to the negotiations, is disabled and unable to testify. The importance of Mr. Koonce's testimony can be seen from the following documents which are already marked as exhibits and which were submitted to the Court.

RTC ex. 1 is a PCA internal memorandum prepared by Mr. Koonce concerning a discussion with Harvey McPhee, the City Health officer, dated May 26, 1969. The memo reveals that in discussing the Reilly site with McPhee, Koonce said:

> This is primarily a local problem and should be handled as such.

In addition, RTC ex. 85, Mr. Popham's memo to PCA lawyer Eldon Kaul of November 27, 1974, indicates (p. 1):

> . . .the PCA advised the city in 1969 that the situation was a local problem and should be handled locally.

Similarly, in May a background paper submitted by Mayor Frank G. Fleetham, Jr. to Dr. Howard Anderson (then Chairman of the PCA Board) November 15, 1974 (Exhibit G to Schwartzbauer affidavit of September 15, 1983), Mayor Fleetham says:

> In May of 1969 the MPCA staff advised the City that the problem was a local one and should be handled by the City.

After these 1969 communications, at a PCA Board meeting held September 14, 1970, the Board was asked by Mayor Frank Howard to join the City in an enforcement action (RTC ex. 7) and the result was the lawsuit filed October 5, 1970 (RTC ex. 8). It appears from the documents that the principal actor on behalf of the State at that time was George R. Koonce. A memorandum dated February 2, 1972 from McPhee reporting a telephone conference between him and Koonce states:

> Mr. Koonce indicated that <u>if the City acquires the property, their office</u> (the Minnesota PCA) <u>would close the matter</u> (the Reilly litigation) and it would be up to us to solve our own problems. (Underlining supplied - document inadvertently marked twice as RTC ex. 30 and 48).

This is precisely how Reilly perceived the negotiations. Reilly's offer to the City <u>and the State</u> (made through the City) was that it would sell the property to the City if it would be accepted by the City and the State "as is" - <u>i.e.</u>,

free of "any and all questions of soil and water impurities and soil conditions. . . ." RTC ex. 31. We believe that the understanding between all three parties as of April 14, 1972, was that since the City and Reilly had come to terms and the City had become the owner and was responsible for correcting the conditions, the lawsuit against Reilly would never be reinstated. This was Reilly's perception. See affidavit of Thomas E. Reiersgord and affidavit of P. C. Reilly. This was a three-party agreement, although Reilly's communications were solely with the City, as agent for the State.

As explained in the Schwartzbauer affidavit dated September 15, 1983, Koonce's deposition could not be taken and submitted to the Court because of his disability.

But even without direct testimony from Koonce or others that the City was the State's agent, it is necessary in determining whether the State did in fact become a party to the April 14, 1972 agreement to interpret its conduct. It would be a simple legal world indeed if all contracts were as express and definite as implied by the State's sophomoric analysis of the law of contracts. In fact, the real world is much more complicated. Contracts are often found to exist from the actions, and even the inactions of the parties. In a situation where the parties have not expressly made an agreement -- where there is not, in the Court's language, "a definite offer and acceptance," the ultimate finder of fact (in this case a jury)

must interpret the actions of the parties to see whether they intended to contract. As Corbin indicates:

> Interpretation is the process whereby one person gives a meaning to the symbols of expression used by another person. The symbols that are most commonly in use are words, singly or in groups, oral or written; but acts and forbearances are also symbols of expression requiring interpretation. 3 Corbin, Contracts § 532.
>
> An implied promise, therefore, is here treated as a promise implied in fact, a promise that the promisor himself made, but a promise that he did not put into promissory words with sufficient clearness to be called an 'express promise.' When a court finds and enforces such a promise as this, it finds it by interpretation of the promisor's words and conduct in the light of the surrounding circumstances. 3 Corbin, Contracts § 562.

In support of his view, Corbin relies in part upon In re Kaufmann's Estate, 137 Pa. Super. 88, 8 A.2d 472 (1939) where the court stated (Id. at 474):

> The general rule governing the interpretation of contracts applies not only where there is an admitted contract under consideration, but also where the controversy is whether there is a contract. Restatement, Contracts § 226 (Comment a). 'Whether the parties are merely negotiating a contract, or entering into a present contract, is purely a question of intention.' Windsor Mfg. Co. v. S. Makransky & Sons, 322 Pa. 466, 472, 186 A. 84, 86, 105 A.L.R. 1096.

In its opinion of August 25, 1983 this Court engages in the process of interpreting the acts of the parties and reaches certain conclusions regarding the intentions of the parties. We will subsequently address the propriety of such a process in considering a motion for summary judgment, where discovery had not been completed, and where the record was far from complete. But it must be noted at this point that this process of interpretation is for the trier of fact, not for the Court as a matter of law. Bergstedt, Wahlbert, Berquist v. Rothchild, 302 Minn. 476, 479-480, 225 N.W.2d 261, 263 (1975). As Corbin explains:

> The question of interpretation of language and conduct - the question of what is the meaning that should be given by a court to the words of a contract, is a question of fact, not a question of law. This is true whether the court is searching for the meaning of the two contracting parties, or for the meaning given to words by the one person who used them, or for the meaning that was given to words by another person who heard or read them and acted in reliance on them, or for the meaning that a reasonable man or an intelligent user of English or an average resident of the community would have given to them. There is no 'legal' meaning, separate and distinct from some person's meaning in fact. 3 Corbin, Contracts § 554.

Thus, even if Reilly obtained no additional evidence through discovery, the responsibility for the interpretation of the State's and Reilly's conduct is for the jury, not for this Court. The Court should not be misled by cases in which the

appellate court which delivers the opinion is merely upholding a jury verdict, as in the Bergstedt case. Published opinions are often written as though the Court is supposed to find whether a contract existed. That may be the case where a jury has not been demanded. It is not the case where the case is to be tried by a jury. In this case, the jury, not the Court, will ultimately be asked to interpret all the acts of the parties, not merely their words.

It is a simplistic and untenable view that the meaning of words used in a contractual setting are to be gained merely by reading the document. As Corbin has explained:

> It is true that when a judge reads the words of a contract he may jump to the instant and confident opinion that they have but one reasonable meaning and that he knows what it is. A greater familiarity with dictionaries and the usages of words, a better understanding of the uncertainties of language, and a comparative study of more cases in the field of interpretation, will make one beware of holding such an opinion so recklessly arrived at. 3 Corbin, Contracts § 535.
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> If the foregoing is correct, a party should be permitted to determine the operative meaning of the words of agreement by proving that both parties so understood them, or that he so understood them and the other party knew that he did, or that he so understood them and the other party had reason to know that he did. 3 Corbin, Contracts § 538.

How does one prove as a fact what it was that the parties intended? The starting point is to ask them. It may

develop that they will testify to different meanings. In that case, the next question will be whether one party knew of the other party's meaning and failed to correct the misunderstanding. If both honestly had a different meaning, then effect may be given to what a reasonable person would have understood. However,

> there is no sound reason for holding that parties are bound by any contract, integrated or not, in accordance with a meaning which the court now finds as a fact that neither of them gave to it. This is true even though the court thinks that this meaning is the only reasonable one, or is the one that accords with 'good English' and the leading dictionaries, or is the one that would be given to the words by a 'normal' speaker or writer, or is the one that accords with ordinary and common usage in the local community or in the local trade or profession.
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> The fact that this meaning fits any one of these descriptions is some evidence that it was in truth held by either or both of the parties; and it is some evidence that either party had 'reason to know' that the other party held it. If a court says that parties are bound by this meaning even though neither one of them held it, it is very probable that the court believes, either that both of them did in fact hold it, or that one of them did and the other had reason to know that he did. But to hold that, although A intends to sell Blackacre and B intends to buy Whiteacre, A must convey and B must accept Greenacre because their 'integration' would be so understood by C or by a large community of third persons, is to hold justice up to ridicule. 3 Corbin, Contracts § 539.

From this it should be obvious that we should not stop in our search for evidence of the parties' intentions with the bare, unexplained documents that are presently in the record. What if witnesses for the State, whose depositions have not yet been taken or completed, admitted that it was the State's intention that it be bound by the settlement? We cannot believe that given such testimony, this Court nor any court in the country, would hold that the State was not bound because "a definite offer and acceptance between Reilly and the State" had not been shown, or because the Court would read the documents in a way which the parties themselves had not read them.

By way of contrast, the process of interpretation engaged in by the Court without an adequate record may be found in the Court's conclusion (Memorandum Order p. 15) that "the present [1973] express intent of the State was not to dismiss the suit." In response, we respectfully ask: how does the Court know that when we have not yet been permitted to ask the State witnesses what their intention was? It is true that we have, on the question of whether the State would deliver a written dismissal, Van de North's letter of June 15, 1973. (RTC ex. 34). But Reilly has a very different interpretation of that letter from that given by the Court in its opinion. We believe that the State was not unwilling to dismiss Reilly -- it was merely unwilling to dismiss the lawsuit until the City came up with a satisfactory remedial plan. Obviously, the only

way to find out what Van de North meant is to ask him. But Reilly has been precluded by counsel for the State and now, by operation of the Court's order, from asking him.

The proposition of law that the existence of a contract depends upon the objective manifestation of mutual assent which in turn is shown by the express, as opposed to the secret, intention of the parties is a useful proposition for excluding evidence that the subjective intent of a party was to stay out of the contractual relationship, while the objective facts show the contrary. It is an altogether different situation when a party seeks to introduce evidence of another party's actual subjective intention to enter a contractual relationship. In such a case the evidence is relevant and courts uniformly admit it.

For example, in Krueger v. State Dept. of Highways, 295 Minn. 514, 202 N.W.2d 873 (1972), testimony of a party's subjective secret intention was central to the court's finding that a contract had been entered. The question in Krueger was whether an attorney could collect a contingent fee for services rendered even though no contract had ever been discussed between or signed by the attorney and his client. There was neither an express offer nor an express acceptance of the contract. Rather, the court looked at the subjective intent of the parties at the time the contractual relationship was entered. The court concluded that "[t]he finding of an

implied-in-fact agreement rests on the credited testimony that respondent retained her counsel in the knowledge and expectation that she was to pay a fee...." Id. at 516, 202 N.W.2d at 875 (emphasis supplied).

Similar evidence was admitted in Kabil Development Corp. v. Mignot, 279 Ore. 151, 566 P.2d 505 (1977). In that case the trial court had admitted testimony concerning the plaintiff's subjective belief that a contract had been made. On appeal, the Oregon Supreme Court described the issue before it as the old conflict between "subjective" and "objective" theories of contract law. The court concluded, citing Professor Corbin, that neither theory was wholly satisfactory in explaining the law of contracts. The court recognized that the "objectivists'" major concern was when evidence of subjective intent was introduced to deny or contradict objective manifestations of an intent to contract. However, the court in Kabil determined that, since the testimony in question was consistent with objective manifestations of an intention to contract, such testimony was admissible. The court reasoned that "a fact-finder might well believe that what a party thought he was doing would show in what he did." 566 P.2d at 509.

The undisputed facts in this case are as follows. After the State and the City initiated a lawsuit against Reilly in state court in October 1970, it was agreed to strike that

action from the trial calendar because Reilly and the City were negotiating the sale of Reilly's property to the City. RTC ex. 14, 15, 16, 17, 18. The State did not take a direct part in those negotiations; rather, it indicated that it would abide by any settlement which the City and Reilly reached. Affidavit of Thomas A. Reiersgord dated June 23, 1983. It essentially authorized the City to handle the settlement. The state did give the City technical advice and recommendations during this time. See, e.g., RTC ex. 21, 22, 23, 24, 25, 27, 28, 29, 30. It also warned the city that it would look to the City for the necessary clean-up and studies if it became owner of the property by settlement with Reilly. RTC ex. 25, 30. Moreover, the State indicated that it would reinstate the matter on the trial calendar only if the City and Reilly failed to settle the matter.

Reilly relied on the State's promises and agreed to sell the property only if Reilly would no longer be responsible to either the City or the State for the claims which had been made with respect to soil and ground water contamination. See, e.g., Reiersgord affidavit dated June 23, 1983. Furthermore, the proper inference to be drawn from the evidence discovered to date is that, at the time of the purchase agreement, the State intended to be bound by that settlement. In fact, from that date on, communications concerning the site and necessary clean-up were conducted between the City and the State, not

Reilly and the State. The State's intent may be proven by testimony of the officers of the MPCA as to their intentions at that time. But a trier of fact may infer that intent from the facts recited above and from additional facts, such as: (1) that the State let the case lie inert from July 1971 until April 1978, (2) that the State demanded a clean-up program from the City, and frequently prepared documents which alleged that the City was violating the law by not undertaking clean-up actions, (3) that subsequent to the purchase when the State dealt with Reilly it dealt directly with Reilly's officers as opposed to its counsel, and (4) that the State collaborated with the City to clean up the site. All these facts and others serve to corroborate the fact that the State intended to be bound by the settlement.

Moreover, the Purchase Agreement itself recites that it is a settlement of the issues in the lawsuit brought by the State and the City against Reilly. RTC ex. 31, ¶ 9. The State did nothing to disabuse Reilly of the understanding that the case, insofar as Reilly was concerned, had been settled by the Purchase Agreement. At the time of the Purchase Agreement, and presumably up until June of 1973, both the City and Reilly expected the State to perform as required by the settlement and to deliver its formal dismissal of the case. Worden deposition at 25; Reiersgord affidavit. When the State declined so to perform in June 1973, it did so by telling the City that it

would not do so because it was not satisfied with the City's clean up efforts (RTC ex. 34, 85 pp. 9-11), and that it did not wish to let the City off the hook the City was on through purchase of the Reilly property, "as is," as part of the settlement. The City, through that purchase as part of the settlement, had stepped into Reilly's shoes with the approval and prior warning of the State, and, in June of 1973, the State was simply holding the City to that prior warning. There was no communication at that time between the State and Reilly. Nor was it even suggested then that Reilly undertake or underwrite the clean-up or additional studies which the State was requiring, although, prior to the Purchase Agreement in 1972, when the State was discussing further studies of the site similar to those being required of the City in June of 1973, the State had looked to Reilly, as owner, to accomplish them. See e.g., RTC 25, 27, 28, 29, 30.

The Court erroneously focused on the lack of a particular, direct communication between a lawyer for the State and a lawyer for Reilly that explicitly states the settlement. Mem. Order at 13. But there is no requirement that parties' intentions regarding contractual arrangements must be communicated directly between them in order to be effective. The messages that went from the State to the City, both from State lawyers and from MPCA officials, that the State would regard the case against Reilly as closed if the City and Reilly

reached a settlement, and that clean-up would be up to the City once the City acquired the property, were surely not intended to be kept secret from Reilly, nor were they. The State's intention was communicated to Reilly through the City, and Reilly communicated back to the State in the same way. No notion of contract law requires principals to communicate face to face in order to be bound. Indeed, principals may be bound by agents possessing only apparent authority, especially when the principal is aware of the agent's acts and does nothing to disabuse the third party's understanding of them.[2/] As recited above, the State did no such thing here. Indeed, such direct communication as there was served only to reinforce Reilly's understanding; the State's lawyer agreed to take the

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2/ In Minnesota, the elements of apparent authority to contract for the principal are: (1) the principal must have held the agent out as having authority, or must have knowingly permitted the agent to act in its behalf; (2) the party dealing with the agent must have actual knowledge that the agent was held out by the principle as having such authority or had been permitted by the principal to act on its behalf; and (3) the proof of the agent's apparent authority must be found in the conduct of the principal. Hockemeyer v. Pooler, 268 Minn. 551, 562, 130 N.W.2d 367, 375 (1964). In the present case the State "knowingly permitted the agent to act on its behalf" by telling the City that it would accept whatever settlement the City and Reilly reached; Reilly had knowledge that the State had done so; and the City's apparent authority was created and confirmed by the State's words and actions. See also Restatement (Second) of Agency § 27 (1958)("apparent authority to do an act is created as to a third person by written or spoken words or any other conduct of the principal which, reasonably interpreted, causes the third person to believe that the principal consents to have the act done" by his agent).

suit off the trial calendar and to reinstate it only if the City and Reilly failed to reach a settlement in their negotiations.

On these facts there is a strong argument that a binding settlement agreement existed between the State and Reilly. There was a meeting of the minds between the two parties as evidenced by their intentions and as further demonstrated by their actions. In its Memorandum Order the Court recognized that a settlement, like a contract, may be implied from the circumstances. Memorandum Order at 13. However, the Court in fact refused to consider the crucial evidence of the State's intent to enter the settlement, and in doing so the Court has misapplied the law of Contracts. In light of the foregoing, the Court should now reverse its order striking Reilly's affirmative defense.

II. The Presence Of Conflicting Inferences From The Available Facts Should Bar Summary Judgment in this Instance.

With this explanation of the principles of basic contract law behind us, let us turn now to the question whether the Court followed the controlling priciples of law regarding the disposition of motions for summary judgment. Rule 56(c) provides for summary judgment only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is

no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." The Eighth Circuit Court of Appeals, like Courts of Appeals in every other Circuit, has repeatedly held that summary judgment is not to be used to weigh and resolve possible conflicting interpretations from the basic facts, e.g., Chennett v. Trustees of Iowa College, 431 F.2d 49 (8th Cir. 1970), and should not be granted prior to the completion of discovery. E.g., City of Rome v. United States, 450 F. Supp. 378 (D.D.C. 1978) (three-judge court), aff'd, 446 U.S. 156 (1980).

In Chennett, supra, the parties had stipulated that the plaintiff, a musician, had been injured in the course of putting his instrument on a bus following a concert. However, there remained two different interpretations of the stipulated facts, either that the plaintiff had put the instrument on the bus by himself for his own interest in protecting his instrument, or that he had done so in furtherance of the work of his employers. The Eighth Circuit reversed the granting of summary judgment and noted the following:

> The point of this is that the court's conclusion necessarily involved a choice or evaluation between two rational possibilities. Evaluative judgment between two rationally possible conclusions from the facts cannot not be engaged in on summary judgment. Only where the facts supportive of summary judgment can be held to have so unambiguously established the actualities of the situation as to leave no basis of substance for dispute as to their reality or as to the conclusion required from them is a summary judgment entitled to be entered.

Id. at 53. See also Snell v. United States, 680 F.2d 545 (8th Cir.), cert. denied, ___ U.S. ___, 103 S. Ct. 229 (1982).

As demonstrated above, a court should be reluctant to put itself in the role of the finder of fact in the context of a motion for summary judgment. Furthermore, when the substantive issue deals with intent, as it did here with the question of whether the parties intended to form a contract, a court should be all the more reluctant to grant summary judgment. As stated by the Fourth Circuit in Morrison v. Nissan Co., Ltd., 601 F.2d 139, 141 (4th Cir. 1979):

> When the disposition of a case turns on a determination of intent, courts must be especially cautious in granting summary judgment, since the resolution of that issue depends so much on the credibility of the witnesses, which can best be determined by the trier of facts after observation of demeanor of the witnesses during direct and cross-examination.

In its memorandum order the Court cited Keys v. Lutheran Family and Children's Services of Missouri, 668 F.2d 356 (8th Cir. 1982), while setting out the proper standards for summary judgment. Memorandum Order at 3-4. The statement in Keys is good as far as it goes and was useful in resolving that case. However, it leaves out one important standard of the law of summary judgments which is particularly relevant to this case. "On summary judgment the inferences to be drawn from the underlying facts contained in the moving party's materials must be viewed in the light most favorable to the party opposing the motion." United States v. Diebold, Inc., 369 U.S. 654, 655

(1962). See In Re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions, 538 F.2d 180, 184 (8th Cir. 1976) cert. denied, sub nom., International Rectifier Corp. v. Pfizer, Inc., 429 U.S. 1040 (1977). In this case, the Court admitted that the parties dispute the inferences to be made from undisputed facts. Memorandum Order at 5. Nevertheless, the Court chose to draw inferences which were unfavorable to Reilly, the non-moving party. As a result, the Court failed to apply the appropriate standard for summary judgment.[3/]

3/ In its memorandum order the Court implied that there was another standard for summary judgment which it was tempted to use. The Court wrote that it would be justified in striking Reilly's affirmative defense based upon "Reilly Tar's inability or unwillingness" to respond fully to plaintiffs' corresponding requests for admissions and interrogatories. Memorandum Order at 4, 5. Reilly notes that such a sanction is available to the Court under Rule 37. However, Rule 37 sanctions may only be implemented against a party when that party has failed to comply with a court order compelling discovery pursuant to Rule 37(b). In this case, plaintiffs have never sought a Rule 37(b) order compelling discovery. Hence, the issue of whether to strike the affirmative defense for failure to respond to discovery requests is not now, nor has it ever been, before the Court. The Court may not, in the context of a motion for summary judgment under Rule 56, strike the affirmative defense solely because Reilly has not answered certain discovery requests to the satisfaction of the other side.

Reilly has now served amended answers to the interrogatories in question. These amended answers still reflect the fact that discovery is continuing and that as a result the answers are not complete. However, the amended answers refer to the information contained in exhibits 1 through 113 and the Reiersgord Affidavit submitted in connection with the original motion for summary judgment. Most of these exhibits were introduced and marked at the Lindall and Van de North depositions which took place in August, 1982. Hence, the plaintiffs had the information they

The Court also contravened the law of summary judgments by granting summary judgment on an issue about which there was a pending motion to compel discovery. In Parrish v. Board of Commissioners of the Alabama State Bar, 533 F.2d 942 (5th Cir. 1976), the circuit court reversed the trial court's decision granting the defendant's motion for summary judgment while the plaintiff's motion to compel discovery was still pending. In Parrish an association of black lawyers had brought an action to inquire whether the readers of the Alabama State Bar examination were discriminating against black applicants. The defendant brought a motion for summary judgment while the plaintiff had a motion before the court to compel production of the exams and the graders' notes. The district court granted the motion for summary judgment and did not rule on the motion to compel. On appeal the Fifth Circuit reversed. In doing so, the court took pains to note that, though it had affirmed a summary judgment in favor of the

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3/ (Footnote Continued)

sought long before April, 1983. Furthermore, this information was contained in the Affidavits of Reiersgord and Thomas Ryan which were filed in the state court action in 1978. This information was also contained in Reilly's memorandum in support of its motion to dismiss or substitute the City as defendant in the state action. That memorandum was filed in 1978. In view of the fact that plaintiffs have had all this information at their disposal for so long, to attach any significance to Reilly's refusal to repeat all that information in the first responses to plaintiffs' discovery requests is to elevate form over substance.

defendant in a virtually identical case involving the Georgia State Bar in 1975, that case was distinguishable because all discovery had been completed. The holding in Parrish is consistent with Reilly's argument that the granting of the State's motion for summary judgment before the determination of the motion to compel discovery was premature.

Parrish is also instructive in this case because the defendants had raised the argument that the requested documents were irrelevant in the face of defendant's uncontroverted affidavits stating that there had been no discrimination. This argument is similar to the State's argument in this case that the conclusory affidavits of its attorneys to the effect that there was no intention to settle the case render Reilly's motions to compel discovery irrelevant. The court in Parrish noted that on the record as it had been developed up to that time there was insufficient factual dispute to warrant a reversal of the summary judgment. However, the court noted that the record was not complete because discovery had not been completed. The court then reasoned that it was conceivable that upon completion of discovery the record would contain sufficient factual dispute to require reversal. It is on the basis of the fact that discovery had not been completed that the court in Parrish reversed the summary judgment. 533 F.2d at 948-49.

Fed. R. Civ. P. 56(f) provides that where a party opposing a motion for summary judgment shows that he is unable to present evidence essential to support its opposition, the Court should provide for discovery of the information from which the party will be able to put together appropriate affidavits or other supporting materials. As evidenced by Reilly's motions to compel, the discovery contemplated in Rule 56(f) has not been provided to Reilly in this case. Reilly is unable to file responsive affidavits other than those now on file for the reasons set forth in the Schwartzbauer affidavit of September 15, 1983. Therefore, Reilly requests that the Court either reverse its order or vacate that order until the end of discovery at which time the Court may reconsider the State's motion.

Although the Court recited principles similar to the foregoing (Memorandum Order at 4), we respectfully submit that it did not apply them. For example, it accepted (Id. at 8-9) the bald conclusion contained in the affidavits of Lindall, Morgan, Starns and Van de North that the case had not been settled by the State. These witnesses are among those whose testimony was the subject of Reilly's motion to compel. Since an intent to be bound by the settlement between the City and Reilly is a subjective matter, and since the State's actions are totally inconsistent with its words, at trial we would clearly be permitted to cross-examine these witnesses as to

their conclusions. To permit the State to use affidavits of the very witnesses who refused to answer questions regarding their understanding and intent turns justice on its head.

This Court was, of course, entitled to reverse its earlier decision and remand Reilly's motion to compel to the Magistrate. But when it did so, it placed itself and all parties in the position where they were dealing with an incomplete record. At that point, the Court should have stopped, or delayed its decision for a ruling by the magistrate on the motion to compel, plus completion of the depositions to which the motion related and other depositions, or summarily denied the summary judgment motion. Its announcement that it would not consider the motion to compel guaranteed that it would not have a complete record, and the incomplete record guaranteed that the Court could properly make only one ruling -- to deny the motion for summary judgment.

As we have seen from the previous discussion, Reilly was not in a position to submit an affidavit from any person acting on its behalf that he negotiated an agreement directly with the State. That did not happen, because the City was negotiating on behalf of the State, as well as on its own behalf. Accordingly, the Court's reliance (p. 9) upon the absence of any such affidavit was misplaced. It should also be noted that at least two of the most important actors -- the State PCA official in charge of the Reilly matter and the

Reilly officer in charge of the settlement -- are either dead or unable to testify. See affidavits of E. J. Schwartzbauer and P. C. Reilly dated September 15, 1983.

It should also be apparent from the foregoing, and from Reilly's memorandum dated June 24, 1983, that the State's reasons for not filing the written stipulation of dismissal in 1973 go right to the heart of the matter. The written stipulation was a mere formality. The settlement had been concluded in 1972. It then becomes helpful to understand that the State's reasons for failing to file this piece of paper was not a reluctance to dismiss Reilly, but merely a desire to keep the lawsuit alive with the City as the responsible party. All of the State's subsequent behavior demonstrates that this was indeed its intent. Accordingly, by failing to consider (Memorandum Order at 15) the rationale for failing to deliver a written dismissal, the Court simply disregarded the heart of the factual issue between the State and Reilly.

We have shown previously (supra at 12-13) that finding as a fact that the State's 1973 intent was not to release Reilly (Memorandum Order at 15) was erroneous and inappropriate in the context of a Rule 56 motion. The opposite conclusion is also reasonable and, Reilly believes, the correct conclusion. Since Reilly has not been permitted to follow up that belief with appropriate discovery directed to the State's intention, it is not proper to grant summary judgment.

In its Memorandum Order, the Court interpreted Reilly's failure to take action to enforce the settlement in 1973 to be "inconsistent with the existence of a binding settlement between Reilly and the State." Memorandum Order at 14. However, the Court could have drawn a different inference from Reilly's course of conduct in 1973 that was consistant with Reilly's settlement theory, to wit: Reilly did not attempt to enforce the settlement because (1) there was no need to because the State was not attempting to pursue the case against Reilly at that time, and had accomplished its objectives (See Reiersgord affidavit of September 15, 1983), and (2) Reilly recognized that the State still had an active claim against the City, thus making the state reluctant to dismiss the case.

Similarly, the Court made an inference contrary to the position of the non-moving party when it stated that "[i]t seems perfectly clear to the Court that the Hold Harmless Agreement between Reilly and St. Louis Park was a measure insisted upon by Reilly precisely because the State refused to settle its suit with Reilly." Memorandum Order at 15. Again, there is another perfectly reasonable inference to be drawn from the fact that Reilly and St. Louis Park entered a hold harmless agreement. Reilly simply perceived that the obtaining of a hold harmless agreement was a considerably less burdensome and less expensive means of obtaining protection from liability

than the insistance on specific performance of its settlement agreement with the State would have been. Accordingly, it chose to accept the assurance of St. Louis Park that it need not insist on dismissal by the State, inasmuch as St. Louis Park would hold it harmless. When, later, St. Louis Park renegged on its promise, Reilly did insist on performance, opposing first the attempt to amend the state action and then the intervention in the federal action.

In the present case, the facts relied upon by the Court in granting the State's motion for summary judgment cannot be said "to have so unambiguously established the actualities" of the circumstances surrounding the real estate purchase agreement in 1972 and the hold harmless agreement in 1973 "as to leave no basis of substance for dispute." See Chenette, supra, 431 F.2d at 53. There are inferences to be drawn. However, as set out in Chenette, summary judgment is inappropriate whenever the facts give rise to varying inferences. Moreover, drawing such inferences against the non-moving party is contrary to law of summary judgments. See Time, Inc. v. Ragano, 427 F.2d 219 (5th Cir. 1970).

III. If This Court Chooses Not To Reverse Or Vacate Its Order, It Should Amend That Order So As To Certify The Order Pursuant To 28 U.S.C. 1292(b).

A district court may amend an order at any time to include certification language pursuant to 28 U.S.C. 1292(b). See 9 Moore's Federal Practice ¶ 110.22[3]. Before an order

may be certified for review under § 1292(b) the court must decide (1) that the order involves a controlling question of law, (2) that there is substantial grounds for a difference of opinion, and (3) that immediate review will materially advance the termination of litigation. See In re Exterior Siding and Aluminum Coil Litigation, 538 F. Supp. 45 (D. Minn. 1982). There is ample authority for this court to make these three findings with respect to its order of August 25, 1983.

Granting the State's motion for summary judgment with respect to Reilly's second affirmative defense involves a controlling question of law; it involves the Court's determination that Reilly's theory of the settlement is legally insufficient. See Memorex Corp. v. Int'l. Business Machines Corp., 555 F.2d 1379 (9th Cir. 1977) (trial court's order granting plaintiff's motion for summary judgment to strike defendant's affirmative defense was certified for interlocutory appeal under § 1292(b)). See also Consumer Products Safety Comm'n. v. Anaconda Co., 445 F. Supp. 498 (D.D.C. 1977) (trial court certified its order denying defendant's defense of collateral estoppel). One test for whether an order involves a controlling question of law is whether the order, if later found erroneous, would constitute reversible error. See Katz v. Carte Blanche Corp., 496 F.2d 747, 755 (3rd Cir.) cert. denied, 419 U.S. 885 (1974). Because this Court's order struck Reilly's second affirmative defense, a finding that that order was erroneous would be reversible because such a finding would

necessitate a new trial on the issue of that defense. Hence, this Court's order meets the first criteria for certification since it involves a controlling question of law.

The second criterion for certification under § 1292(b) is whether there is a substantial ground for difference of opinion concerning the issue in question. We note that such a finding by the Court in this case would not necessarily mean that the Court was in doubt as to the correctness of its decision. See Brown v. Texas & Pacific R.R., 392 F. Supp. 1120 (D. La. 1975). Rather, such a finding would be a recognition by the Court that this case is complex, that the issues are important, and that degree of certainty required for granting a summary judgment is very high. See also United States v. Bonnell, 483 F. Supp. 1091 (D. Minn. 1979)(Judge MacLaughlin certified a ruling, which he had "carefully considered and weighed," because the issue was "hotly contested" and presented novel and difficult questions).

The final consideration for certifying the order is whether such certification will materially advance the ultimate termination of the litigation. The test for this criterion is whether an interlocutory appeal will save time and expense by avoiding a retrial. Baxter Travenol Laboratories, Inc. v. Lemay, 514 F. Supp. 1156, 1159 (S.D.Ohio 1981); see also Berman v. Schweiker, 531 F. Supp. 1149 (N.D.Ind. 1982)(certification of order denied because reversal of order on appeal would not require a retrial).

In this case the appeal to the Eighth Circuit can be accomplished and concluded before the case is presently scheduled to go to trial. Hence, without delaying the trial at all, it will be possible to get a resolution of this issue.[4/] If certification of this order is granted and if on that appeal this order is reversed, there will still be time for Reilly to conduct the necessary discovery to substantiate its defense in time for the trial. However, if this order is not certified for interlocutory appeal and if on appeal following the termination of the trial this order is found to be erroneous, there will not only have to be a new trial, but in addition, there will necessarily have to be a new discovery period involving the retaking of many depositions. Hence, an immediate appeal will materially advance the termination of litigation.

Because the order of August 25, 1983 meets the three criteria necessary for interlocutory appeal, this Court, if it

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4/ At the hearing on the State's Motion for Summary Judgment, the Court expressed some concern that this litigation is holding up the cleanup process at the site in St. Louis Park and that Reilly's second affirmative defense is merely a dilatory tactic. That is not the case. The efforts to take remedial measures at the site are proceeding entirely independently from this action. We also note that Reilly's second affirmative defense does not constitute a dilatory maneuver in any way. Reilly objected to the state's intervention in the suit, and Reilly interposed this defense only when the state was permitted to intervene. See Schwartzbauer affidavit of September 2, 1983.

chooses not to reverse or vacate that order, should amend its order to include the certification language contained in 28 U.S.C. § 1292(b).

CONCLUSION

This is a case where the documents produced from the files of the intervenors suggests a strong probability that both of them - the State and the City - truly believed from 1972 to at least 1976 that the Reilly case had been completely concluded and that it would be futile to seek any further recovery from this defendant. It is a case where the evidence shows that Reilly shared that belief. Given that, there is no way that a summary determination against the defendant when it has not even completed its discovery on the issue of settlement can be reconciled with the law of implied contracts or with the principles governing the determination of motions for summary judgment.

This is also a case where the practical difficulties involved in establishing the settlement are immense. Two of the principal actors on behalf of the State and Reilly are unavailable -- one is incompetent to testify, the other is deceased. Moreover, much time has elapsed. At best, memories may either be faded or colored by natural human instincts. Even if discovery were unfettered by premature court orders, it would be difficult to establish what the parties really intended in 1972.

Statutes of limitation are generally available to prevent miscarriages of justice caused by the unavailability of witnesses and the lapse of time. But Congress has apparently decreed that we can punish in the 1980's that which was perfectly lawful in the 1930's, 1940's, 1950's and 1960's and has apparently authorized judicial inquiry into those ancient activities. But even this principle is expanded beyond the limits of its logic when parties other than the federal government are allowed to intervene, to assert stale claims under the umbrella of the new legislation, and to seek to upset in 1980 a settlement apparently made in 1972. Given all this, the only place to which a defendant (even one charged with polluting the environment) can turn for fair play is the judicial system--to the Court and to the jury.

For the reasons stated above, this Court should either (1) reverse its order of August 25, 1983, (2) vacate that order pending resubmission of the State's motion at the close of discovery, or (3) certify its order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b).

Dated: September 16, 1983

Respectfully submitted,

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